

Judge Hursh awarded claimant permanent partial disability benefits (PPD) based on a 40 percent impairment rating to her right hand. Claimant requests review of Judge Hursh's finding concerning the nature and extent of her disability. Claimant asserts her impairment involves the right arm or shoulder. The sole issue raised on review is: What is the nature and extent of claimant's injury?

FINDINGS OF FACT

Claimant suffered accidental injury on June 18, 2010. She was feeding paper into a machine when her right hand got pulled into the machine and crushed by rollers. Firefighters disassembled the machine and freed claimant 30 minutes later. Claimant was taken by ambulance to Overland Park Regional Medical Center.

Dr. Jeffrey Dillow, M.D., a board certified plastic and reconstructive surgeon, operated on claimant on June 19, 2010, including: (1) repairing an extremely large laceration, (2) placing a titanium plate in her fractured ring finger, (3) repairing ring and long finger extensor tendons, and (4) repairing nerves to the right long and fifth ring finger.

Claimant had multiple follow-up appointments. Dr. Dillow restricted claimant against working with her right hand. Dr. Dillow also ordered physical therapy.

Claimant required additional surgery. On October 26, 2010, Dr. Dillow performed scar release on the tendons involving the long, ring and small fingers, released an A1 pulley, reconstructed a second pulley, and performed a z-plasty of claimant's fifth finger.

On December 10, 2010, Dr. Dillow evaluated claimant regarding decreased range of motion and contractures or tethering of the tendons. Unfortunately, claimant was in a car accident and unable to get to her physical therapy appointments. After she was able to resume physical therapy, Dr. Dillow noted claimant's range of motion improved. Claimant had passive motion, but her active motion was still limited. Dr. Dillow continued to restrict claimant against using her right hand.

Three months later, on April 8, 2011, claimant's range of motion had improved. Dr. Dillow recommended more physical therapy. Dr. Dillow released claimant at maximum medical improvement on June 10, 2011. Dr. Dillow restricted claimant against constant use of her right hand and to not lift more than 15 pounds with her right hand.

Dr. Dillow testified claimant had a number of injury-related problems, including grip strength loss, injury to her ulnar and medial nerves and some loss of sensation distally in the MP (metacarpophalangeal) joint of the third, fourth and fifth digits. Dr. Dillow indicated claimant did not have a radial nerve injury. Dr. Dillow also testified claimant had decreased range of motion of her DIP (distal interphalangeal) joints, but no true ankylosis. Based on the AMA *Guides*,<sup>1</sup> Dr. Dillow rated claimant's right upper extremity at 20 percent due to loss of grip strength.<sup>2</sup>

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<sup>1</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4<sup>th</sup> ed.). All further references to the *Guides* are based upon the fourth edition of the AMA *Guides*.

<sup>2</sup> Dillow Depo. at 19-20, 31-32, Ex. 3.

Regarding such upper extremity impairment, Dillow opined:

Q. And when you say that, Doctor, you are referring to the entire right upper extremity, correct?

A. I am referring to the patient's hand, which is part of the right upper extremity, but it's a primary – one of primary functioning aspects of the upper extremity, correct, but this is related to her hand, which obviously affects her upper extremity. This is how I felt was the best way for basically rating her in this instance.

Q. Doctor, would you agree with me that the AMA Guides when referring to impairment related to grip strength is not an impairment that is limited to the hand, but, in fact, as you have opined it is an impairment to the right upper extremity?

A. Correct.

Q. So in that sense your impairment rating is not limited to the hand because it is not provided by the Guides, would you agree?

A. I would agree, yes.

Q. As such your opinion would be as you have detailed in your report that is marked as Exhibit 3 your opinion is she suffered a 20 percent impairment to the right upper extremity and while the injury happened at the hand you are not testifying nor opining her impairment is limited to her hand, correct?

A. Correct.<sup>3</sup>

...

Q. So I guess what I am trying to make sure that I understand is that your opinions is with regard – your opinion with regard to permanent partial impairment suffered by Ms. Rodriguez relates to the right upper extremity?

A. Correct, yes. I do feel her hand is a significant part of her upper extremity and hence relates to function of her upper extremity, correct.

Q. And that is how you arrived at your impairment rating to the right upper extremity?

A. Yes.

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<sup>3</sup> *Id.* at 21-22.

Q. Because while the location, if you will, of the injury was at the hand, her entire right upper extremity is affected?

A. Correct, yes.<sup>4</sup>

. . .

Q. Now, Doctor, in arriving at your permanent partial impairment opinion, and I know this will sound like a previous question, but there is a slight distinction, so let me ask the question. The loss of motion at the third and fourth digits of the right hand, did you separately and independently account for that impairment in arriving at your disability impairment or your permanent partial impairment rating?

A. As I have mentioned before I felt that the impairment to each of those fingers was in my opinion involved in her grip strength and that is why I felt that the grip strength better focused and was a reasonable means to evaluate her overall function, which I have mentioned previously and rather than evaluating each finger and I actually have done – I did each finger, if that makes a difference, I mean, I classified her ring and her long finger as well as her small finger, which actually her motion was fairly good and my – I compared each finger, broke down the range of motion loss, her partial sensory loss, not complete sensory loss, using different tables in the AMA Guide [sic] and it was a 22 percent hand impairment, which also the conversion brings it to a 20 percent upper extremity impairment.<sup>5</sup>

Dr. Dillow testified claimant's crush injury affected "[h]er right hand and fingers"<sup>6</sup> and she had a "permanent hand functional issue"<sup>7</sup> and "several disabilities . . . related to her hand."<sup>8</sup> Even though claimant suffered injury to her hand, Dr. Dillow testified that her right upper extremity was affected and her impairment was to the right upper extremity. He stated, "Some would argue that it is only the hand, but in my opinion the upper extremity is involved significantly with this hand injury, so . . . I feel it is fair that the upper extremity is documented as the impairment, ultimately the impaired structure . . . ."<sup>9</sup>

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<sup>4</sup> *Id.* at 30-31.

<sup>5</sup> *Id.* at 31-32.

<sup>6</sup> *Id.* at 6.

<sup>7</sup> *Id.* at 17.

<sup>8</sup> *Id.* at 24.

<sup>9</sup> *Id.* at 33-34.

Dr. Dillow agreed the *Guides* permit impairment for loss of sensation and loss of range of motion and claimant indeed had such impairment, but he did not know how much impairment. He further agreed the *Guides* allow all such impairments to be accounted for in an overall impairment rating. Still, Dr. Dillow opined his rating based on grip strength best accounted for all of the effects of claimant's injury, including sensory loss, nerve injuries and significantly decreased range of motion and function.<sup>10</sup> Dr. Dillow noted grip strength is the "primary function" of the hand.<sup>11</sup>

At the request of her attorney, Dr. Fernando Egea, M.D., examined claimant on November 23, 2011. Dr. Egea diagnosed claimant with ankylosis<sup>12</sup> of the right third and fourth digits at the DIP and PIP (proximal interphalangeal) joints, total loss of grip strength in the right hand, loss of sensation in the right middle, ring and little fingers distally from the MP joint and in the area innervated by the radial nerve, as well as inability to close her hand due to the injury. Dr. Egea's examination of claimant's shoulders, arms, elbows and forearms was normal, including normal bulk, tone and strength, except for strength loss of the right hand and fingers.

Dr. Egea testified claimant's injury-related physical difficulties included inability to "move the hand and fingers and utilize the right hand appropriately."<sup>13</sup> He recommended claimant: (1) not lift, carry, pull or push greater than 10 pounds; (2) not use the right hand and fingers to grip; and (3) avoid sensory discrimination tasks with the last three digits.

Based on the *Guides*, Dr. Egea opined claimant sustained:

- a 30 percent permanent partial impairment to her right hand due to loss of sensation distally from the MP joint of the third, fourth and fifth digits, which converts to a 27 percent impairment to the right upper extremity;
- loss of grip strength "of the right hand,"<sup>14</sup> an impairment of a 30 percent to the right upper extremity; and
- a 72 percent impairment to her fingers due to loss of motion of the third and fourth digits, which converts to 13 percent to the right upper extremity.

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<sup>10</sup> *Id.* at 18-19, 23-24, 26-28, 31-34.

<sup>11</sup> *Id.* at 20.

<sup>12</sup> Ankylosis is a condition where joints are basically fused and can not move. (Dillow Depo. at 26).

<sup>13</sup> Egea Depo., p. 13.

<sup>14</sup> *Id.*, Ex. 2 at 6.

Using the combined values chart, Dr. Egea opined claimant had a 56 percent impairment to the right upper extremity. He testified claimant's impairment was "from the shoulder down."<sup>15</sup> While Dr. Egea's testimony and report note claimant had loss of grip strength in the right hand, he testified claimant's grip strength loss can not be confined to the right hand because the *Guides* require the rating to the right upper extremity:

Q. Now Doctor, pursuant to the Fourth AMA Guides, a loss of grip strength in the right hand, is that an impairment that can be limited to the right hand?

A. No. It's right upper extremity.

Q. Is that what the Fourth AMA Guides provide?

A. Yes. It's upper extremity, period.<sup>16</sup>

Dr. Egea testified the *Guides* require all abnormalities to be rated. He noted Dr. Dillow only accounted for grip strength loss, but not loss of sensation or loss of range of motion of the fingers.

Claimant testified it is very difficult for her to grip things. She is not able to make a fist. She can not ring a mop, peel fruit, cut watermelon or slice vegetables. Claimant admitted she can still grip with her right hand, but that her hand tires easily. Claimant did not testify as to any right arm problems apart from her right hand.

#### **PRINCIPLES OF LAW**

K.S.A. 2009 Supp. 44-501(a) states in part:

In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends.

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.

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<sup>15</sup> *Id.* at 28.

<sup>16</sup> Egea Depo. at 20; see also p. 23.

K.S.A. 44-510d(a) states in part:

If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

....

(11) For the loss of a hand, 150 weeks.

(12) For the loss of a forearm, 200 weeks.

(13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

....

(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

(b) Whenever the employee is entitled to compensation for a specific injury under the foregoing schedule, the same shall be exclusive of all other compensation except the benefits provided in K.S.A. 44-510h and 44-510i and amendments thereto, and no additional compensation shall be allowable or payable for any temporary or permanent, partial or total disability . . . .

K.A.R. 51-7-8(c) states, in part:

(1) Each injury involving the metacarpals shall be considered an injury to the hand. Each injury involving the metatarsals shall be considered an injury to the foot.

(2) If the injury results in loss of use of one or more fingers and also a loss of use of the hand, the compensation payable for the injury shall be on the schedule for the hand. The percentage of permanent partial loss of use of the hand shall be at least sufficient to equal the compensation payable for the injuries to the finger or fingers alone.

K.S.A. 44-510e(a) states, in part:

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

### ANALYSIS

Judge Hursh indicated both impairment ratings were imperfect. The Appeals Board agrees. Dr. Egea's rating was partially based on claimant having a radial nerve injury, joint ankylosis and total grip strength loss. Dr. Dillow noted claimant did not have a radial nerve injury, joint ankylosis or total grip strength loss. Dr. Egea's rating was inflated because claimant had some finger motion, only partial strength loss and no radial nerve injury.

Dr. Dillow's rating was incomplete. Dr. Dillow only accounted for grip strength loss. His impairment rating failed to account for loss of sensation or decreased range of motion, so his rating was too low.

The Appeals Board agrees with Judge Hursh that the most equitable method of determining claimant's impairment in this case is to simply average the divergent ratings provided by the medical experts. Of course, the main dispute concerns whether claimant's impairment should be rated at the level of the hand, arm or shoulder.

Determining what part of the schedule applies in this case is dependent on the situs of claimant's disability based on claimant's testimony, medical records, medical testimony, and application of the *Guides* in relation to Kansas workers compensation law.

The available PPD benefits depend on the situs of the resulting disability, not the situs of the trauma.<sup>17</sup> Therefore, claimant is not limited to benefits involving her right hand *if* her injury caused disability to her forearm, arm or shoulder.

Claimant's testimony only supports disability to her right hand. She simply did not testify regarding any physical problems apart from her right hand. Similarly, the medical records demonstrate claimant injured her right hand. Dr. Dillow's records do not refer to any physical problems apart from claimant's right hand. Dr. Egea's physical examination revealed claimant's right shoulder, arm, elbow, forearm and wrist to be normal. Additionally, both physicians' restrictions only concerned claimant's right hand.

The medical testimony is that claimant had impairment to her right upper extremity. Dr. Dillow testified claimant had a 20 percent impairment rating to the right upper extremity. On cross-examination, Dr. Dillow was asked to clarify whether such impairment related to the right upper extremity. He stated he was referring to claimant's hand, but soon agreed claimant's impairment affected her right upper extremity. Dr. Dillow repeatedly testified claimant's impairment involved the right upper extremity, not just the hand.<sup>18</sup> Dr. Egea also rated claimant's right upper extremity, not just the right hand.

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<sup>17</sup> *Bryant v. Excel Corp.*, 239 Kan. 688, 692, 722 P.2d 579 (1986).

<sup>18</sup> Dillow Depo. at 18, 21-22, 30-32, 33, 38-39.



Dr. Dillow testified the injury affected the function of claimant's right arm, but he also testified claimant's crush injury caused a functional issue and disabilities to claimant's right hand and fingers. Dr. Egea testified claimant's impairment involved her arm, but he also testified claimant's injuries "all related to the right hand and fingers."<sup>19</sup>

Dr. Dillow agreed the *Guides* do not provide for impairment to the hand based on grip strength loss. Dr. Dillow testified the *Guides* only allow impairment to the upper extremity based on decreased strength. In the same vein, it appears Dr. Egea's rating involved the right upper extremity simply because the methodology in *Guides* for rating grip strength loss assigns corresponding impairment to the upper extremity and the *Guides* do not specify a rating for strength loss involving the forearm, hand or fingers.

Strict adherence to the *Guides* should not be used to nullify or circumvent Kansas law, and in particular, application of the schedule in K.S.A. 44-510d. Such statute says that if an employee is entitled to compensation for a specific injury identified under the schedule, such compensation is exclusive, apart from medical treatment. Following the *Guides* verbatim could render the schedule meaningless. The *Guides* do not control over specific statutes, including application of the schedule in K.S.A. 44-501d.<sup>20</sup>

The *Guides* and Kansas law do not always fit nicely together. The *Guides* provide ratings to the upper extremity. The schedule does not specifically list the "upper extremity." Upper extremity injuries accounted for under our schedule include the finger, thumb, hand, forearm, arm and shoulder. An upper extremity rating is not necessarily an arm rating. Pertinent to this case, Kansas law recognizes that PPD benefits for permanent injuries to the hand, forearm, arm and shoulder are based on 150, 200, 210 and 225 weeks respectively. The *Guides*, however, classify forearm, arm and shoulder injuries as involving the upper extremity. Of course, it would be unfair under the statutory schedule to award a claimant with shoulder impairment benefits only based on the arm, just as it would be unfair to award a claimant benefits based on the arm if he or she only had a hand or forearm impairment. An award of PPD benefits must be based on the actual situs of the disability based on Kansas law, which classifies different parts of the upper extremity as warranting different PPD benefit levels under the schedule.

An example is *Hayes*,<sup>21</sup> where claimant had upper extremity injuries, including loss of grip strength, but no impairment or complaints above the forearm. Three physicians rated claimant to each upper extremity. The administrative law judge awarded compensation to each upper extremity at the arm level. The Appeals Board disagreed:

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<sup>19</sup> Egea Depo. at 7.

<sup>20</sup> See *Redd v. Kansas Truck Center*, 291 Kan. 176, 196-197, 239 P.3d 66 (2010).

<sup>21</sup> *Hayes v. SPX Cooling Technologies, Inc.*, No. 1,040,574, 2009 WL 5385890 (Kan. WCAB Dec. 3, 2009).

The ALJ awarded claimant upper extremity impairments at the level of the arm. This utilizes 210 weeks to calculate the award. However, claimant's testimony discusses only his fingers, hands and wrists. There is no evidence in this record that identifies any impairment at or above the level of the forearm. K.S.A. 44-510d limits an award to the forearm to the 200-week level. "It is the situs of the resulting disability, not the situs of the trauma, which determines the workers' compensation benefits available in this state." [footnote omitted]. Here the situs of claimant's disability goes no higher than claimant's wrist. Therefore, under K.S.A. 44-510d, the award will be calculated at the 200-week level of the forearm. The Award of the ALJ will be modified accordingly.

A similar result occurred in *Anderson*.<sup>22</sup> The treating doctor rated claimant at 0 percent impairment. Dr. Prostic rated claimant at 16.5 percent to the hand, which translated to 15 percent impairment to the upper extremity at the level of the shoulder, even though claimant's symptoms were limited to the wrist. Dr. Prostic agreed the *Guides* do not rate at the forearm level, even though Kansas law addresses forearm impairment. The Appeals Board split the ratings for a 7.5 percent impairment to the upper extremity at the level of the forearm and awarded benefits based on 200 weeks, not 210 weeks for arm impairment or 225 weeks for shoulder impairment.

Here, claimant has no disability apart from her right hand and fingers. Claimant did not testify to any other upper extremity problems. Dr. Egea's report notes claimant's strength loss and physical difficulties were to her hand and fingers. Dr. Egea did not identify anything wrong with claimant's upper extremity, except to her hand. Dr. Dillow testified claimant's injury affected her right hand and fingers, and caused permanent hand function issues and disabilities. He assigned "upper extremity" impairment based on the fact that claimant's hand injury affected the use of her arm. If this logic is followed, no hand injury would result in PPD benefits being limited to the hand, so long as the hand injury affected the arm, even if there was nothing physiologically wrong with the arm.

The Board concludes claimant's permanent partial disability benefits are limited to the 150 weeks available under K.S.A. 44-510d(a)(11) for hand impairment.

The Board agrees with Judge Hursh's methodology in arriving at the 40% impairment rating to the hand. However, the Board notes a minor calculation error in Judge Hursh's Award. The balance respondent owes for an underpayment of temporary total disability should be \$1,473.49 and not \$1,500.49 as listed in the Award.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal. Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

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<sup>22</sup> *Anderson v. Prestige, Inc.*, No. 1,010,407, 2005 WL 1365154 (Kan. WCAB May 31, 2005).

**AWARD**

**WHEREFORE**, it is the Board's decision that the Award of Administrative Law Judge Kenneth J. Hursh dated August 1, 2012, is modified to reflect that respondent only owes claimant an additional \$1,473.49 for an underpayment of temporary total disability benefits, not \$1,500.49, but his Award is otherwise affirmed in all other respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of December, 2012.

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BOARD MEMBER

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